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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

PHILIP SAXNER and RUBIN SAXNER doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment entered in the above case on July 20, 1959, by the United States Court of Appeals for the Seventh Circuit, reversing and remanding with directions the trial court's order dismissing the complaint.[1]

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, p. 1a) is reported at 269 F. 2d 322.

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[1] The trial court's order was affirmed in part but only as to the defendants who owned the buildings in which the other defendants operated taverns. These owners did not join in the appeal.

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, *infra*, p. 9a) was entered on July 20, 1959. An order of the Court of Appeals denying a rehearing (Appendix C, *infra*, p. 10a) was entered on September 1, 1959. The time for filing a petition for writ of certiorari was extended, by order of Mr. Justice Clark on December 1, 1959 to January 14, 1960 (Appendix D, *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED.

Whether there is a common law right of action against a vendor of liquor, who sells to an intoxicated vendee, in violation of a penal statute, in favor of those injured by the intoxication of the vendee, in jurisdictions which have Dram Shop or Civil Damage statutes.[2]

STATUTES INVOLVED.

Section 131 of the Illinois Liquor Control Act, sec. 131, Ch. 43, Illinois Revised Statutes, 1959, which was in effect at the time of the alleged occurrence, provides:

> No licensee nor any officer, associate, member, representative, agent or employee of such licensee shall sell, give or deliver alcoholic liquor to any minor, or to any intoxicated person or to any person

[2] We omit from the question presented the circumstance of the case at issue, that the liquor was sold in one state and the injuries occurred in another state, because we do not feel it to be material to a determination of the question. While it is true that the Court of Appeals sought to give common law redress because of the consequence of denying extraterritorial effect to both the Illinois and Michigan liquor control acts, it would appear that the holding of the decision would apply equally as well to situations where no state boundary lines were crossed but which are otherwise analogous.

known by him to be an habitual drunkard, spendthrift, insane, mentally ill, mentally deficient or in need of mental treatment.

Whoever violates this Section shall, in addition to other penalties provided for in this Act, be fined not more than $100, or shall be imprisoned in the county jail for a period of not more than six months, or both, for the first offense; and for the second and subsequent offenses shall be fined not less than $50 nor more than $100, or shall be imprisoned in the county jail for a period of not more than six months, or be both so fined and imprisoned.

Section 94 of the Illinois Liquor Control Act, sec. 94, ch. 43, Illinois Revised Statutes, 1959, which was in effect at the time of the alleged occurrence, and sets forth the purpose of the Act, provides:

> This Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.

Section 135 of the Illinois Liquor Control Act (known as the Dram Shop Act), sec. 135, ch. 43, Illinois Revised Statutes, 1955 and Section 22 of the Michigan Liquor Control Act, sec. 18.993, 13 Mich. Stat. Ann., 1957, which were in effect at the time of the alleged occurrence, are not directly involved in the question presented for review. However, the Illinois section is set forth in Appendix E (*infra*, p. 12a), and the pertinent text of the Michigan section is set forth in Appendix F (*infra*, p. 14a).

STATEMENT.

Plaintiffs, Mary Ann Waynick, Wilma Ann Scruggs, and Carl Mack Waynick, Linda Kay Waynick, Nellie Sue Waynick and Alice Faye Waynick, minors, by Mary Ann Waynick, their mother and next friend, who are citizens and residents of the state of Michigan, filed a diversity action in the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago, Illinois against defendants who are citizens and residents of the state of Illinois. It names as defendants Chicago's Last Department Store, an Illinois corporation, Philip Saxner and Rubin Saxner, doing business as Phil's Tavern, and William Turbin, doing business as Matlan Liquors, who were engaged in the business of selling and furnishing intoxicating liquors in the state of Illinois.

The complaint (A.A. 6-19[3]) seeks recovery of damages sustained by plaintiffs, when an automobile under the control of Bruce Sims, its owner, and driven by Johnie E. Owens, collided on U.S. Highway 112 in the state of Michigan with an automobile in which plaintiffs were riding, and which was then being driven by William Gerald Scruggs, who was killed in the collision. It alleges (A.A. 12-13) that from 4 P.M. on July 28, 1956 to after midnight of said day, Chicago's Last Department Store, the Saxners and Turbin sold and furnished intoxicating liquor to Sims and Owens, when they were intoxicated, and thus did contribute to their said intoxication, the liquor being furnished in large quantities both by the glass and by carry-out bottles, which intoxication resulted in and was the proximate cause of severe personal injuries and loss of means of support to the plaintiff.

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[3] "A.A." refers to appellants' appendix in the Court of Appeals.

A motion to dismiss the cause (A.A. 19-20) was made by the Saxners, while Chicago's Last Department Store and Turbin moved for judgment on the pleadings (A.A. 20-23 and 24-26). The principal ground relied on in all three motions was that neither the Illinois Dram Shop Act nor the Michigan Liquor Control Act applied, because the sale occurred in Illinois while the injury took place in Michigan, and neither Act has any extraterritorial effect (A.A. 20, 21, 25). The motions for judgment on the pleading raised the further point that the complaint did not state a common law cause of action on the ground that "the common law gives no remedy for injury following the sale of intoxicating beverages to an ordinary man", and on the further ground that the Illinois Dram Shop Act has preempted the field, precluding common law liability (A.A. 22-23 and 25).

The U.S. District Court, Joseph Samuel Perry, J., entered an order sustaining Saxners' motion to dismiss on the basis of the decision in *Eldridge* v. *Don Beachcomber, Inc.*, 342 Ill. App. 151, 95 N.E. 2d 512 (leave to appeal denied, 346 Ill. App. XIV), which held that Illinois Dram Shop liability does not arise where the sale of liquor occurs in Illinois but the injury occurs in another state, and dismissing the cause, on its own motion, as to the other defendants (A.A. 39). Plaintiffs appealed.

Judge Schnackenberg's opinion for the Court of Appeals (Appendix A, *infra*, pp. 1a-8a) affirmed the District Judge's view that neither the Illinois Dram Shop Act nor the Michigan Liquor Control Act applied extraterritorially to the situation, but held that, on the alleged facts, the injured parties had a common law right of action against the defendant liquor vendors.

The court rejected the defendants' argument that the Illinois Dram Shop Act has "preempted the field", pre-

cluding common law liability, and held that the common law of Michigan as to tort liability was controlling (id., *infra*, pp. 3a-4a). The court stated that common law liability was created because of the circumstances that the sales in question were "not usual sales to adults or ordinary men" but "were sales to intoxicated persons", and "were not sales to 'a strong and able-bodied man' as referred to in *Manthei* v. *Heimerdinger*, 332 Ill. App. 335, 352, 75 N.E. 2d 132, 140, relied on by defendants"; and because Section 131 of the Illinois Liquor Control Act, which provides for criminal penalties for sales of alcoholic liquor to an intoxicated person, imposed a duty on defendants which they breached in making the sales in question (id. *infra*, p. 5a).

Judge Knoch wrote a dissenting opinion (id., *infra*, pp. 7a-8a), upon the ground that the statute relied upon by the majority is a penal statute which does not create a civil right of action in tort. He further declined to accept the majority's distinction that an intoxicated person is not an "able-bodied man".

REASONS FOR GRANTING THE WRIT.

1. This is a case of novel impression. Although not argued by plaintiffs in their briefs,[1] the court below, in its apparent compassion for them, held that under the circumstances of the case they had a common law right of action against the defendant liquor vendors. This holding that there is a common law cause of action against one who unlawfully sells liquor to an intoxicated person in favor of those injured by the intoxication of the per-

[1] Plaintiffs' brief in the Court of Appeals is not part of the record. However, their brief in the District Court in answer to defendants' several motions to dismiss and for judgment on the pleadings appears in appellants' appendix, pp. 27-39.

son so sold, represents a departure from settled common law doctrine, previously adhered to by all state as well as federal courts, by an unbroken line of decisions, and presents an important and serious conflict in the law warranting resolution by this Court. It is to be especially noted, in this respect, that in a *per curiam* opinion,[4a] decided before, but released for publication after the publication of the opinion in this case, the Illinois Appellate Court reached a decision which appears diametrically opposite from the decision below. In arriving at such an adverse result, the court below violated the rule of this Court that Federal courts must apply applicable state law, and created thereby, in the exercise of its diversity of citizenship jurisdiction, serious discrimination between non-citizen and citizen, in derogation of constitutional guarantees of equal protection of the law. The decision below is important not only because of the conflict and discrimination created and the many provocative questions[5] it raises, but also because of the unprecedented and calamitous results which are likely to flow from it.

The decision below is sure to have a great impact on the liquor selling industry by greatly increasing the risks and hazards of the business. Before the decision, there

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[4a] **Busser v. Noble, et al.**, 22 Ill. App. 2d 433, 161 N.E. 2d 150 (Judgment entered April 29, 1959, rehearing denied October 7, 1959, opinion released for publication October 7, 1959). For a complete discussion of this case see this petition, **infra**, pp. 14-15.

[5] It raises such questions as to what is the period of limitations in such a common law action (the period of limitations in most civil damage statutes, as in the Illinois statute, being just one year)?, who can bring such an action?, and what types of injuries are compensable in such an action—bodily injury, property damage, loss of support, death (there being no common law action for death or loss of support)?

was generally considered to be no remedy for damages against a vendor of liquor, in states which had no civil damage statutes; and in those states which did have such statutes, the statutory right of recovery was considered to be exclusive. Since persons desiring to operate businesses which sell liquor to the public had to concern themselves only with statutory liability, they were able to protect themselves from the risks of such ventures, by so called "dram shop" or "liquor liability" insurance which covers only liability from suits under dram shop or civil damage statutes. The decision of the court below, however, has created a vacuum for vendors of liquor, so far as insurance coverage is concerned under available and existing types of insurance contracts. The available "dram shop" or "liquor liability" insurance does not cover common law liability;[5a] neither does so called "public liability" insurance which generally excepts from its coverage, liability resulting from the sale of liquor.

Not only has the decision of the court below created a kind of liability against vendors of liquor in states which have no civil damage statutes, but, if allowed to stand, may result in common law suits ultimately replacing dram shop suits, to a great extent, even in states which have civil damage suits. In respect to the amount of recovery allowable,[5] the preference of injured parties would undoubtedly be in favor of common law suits. To be sure, the court below sought to give common law

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[5a] Upon remand of the present case to the trial court, defendants' counsel (who were retained by defendants' dram shop insurers) sought and obtained leave to withdraw upon the ground that defendants' dram shop policies do not cover such a "common law" risk.

[5] The limits of each person injured under the Illinois Dram Shop Act (Appendix E. infra, pp. 12a-13a) is $20,000.00.

redress because of the situation that the liquor was sold in one state and the injury occurred in another state, but the effect of the decision is not to limit it to situations where state boundary lines have been crossed and it would appear to apply equally as well to intra state situations. It is also true that the decision is limited to circumstances where sales are made to intoxicated persons, in violation of penal statutes, but this is a limitation broad enough in scope to allow common law actions in a multitude of situations. Penal statutes, prohibiting the sale of intoxicating liquor to intoxicated persons, minors and habitual drunkards, are quite common and in effect in many states.[7] Furthermore, hardly a situation of injury resulting from the intoxication of a vendee could arise, where it could not be alleged that the sale was made to the vendee while he was intoxicated. Intoxication being descriptive of a physical and mental state and nothing more, it becomes a question of fact as to whether the vendee was intoxicated when a sale was made to him. Conceivably a drinker could become intoxicated from his first drink of liquor, so that a sale of the second drink would be subject to the allegation that the sale was made to an intoxicated person.

2. The cases are overwhelming to the effect that at common law it is not considered a tort to sell intoxi-

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[7] A few examples are California which makes a sale to minors unlawful (see **Fleckner v. Dionne**, 94 Cal. App. 2d 246, 210 P. 2d 530); Wisconsin which has a penal statute prohibiting sales to minors (Wis. Stat., sec. 176.30[1]); Tennessee which makes it a misdemeanor to sell intoxicating liquor to any husband who is a habitual drunkard after prohibitory notice (see **Riden v. Grimm**, 97 Tenn. 220, 26 S.W. 1097); and Michigan which makes it illegal to sell to any person in an intoxicated condition (see sec. 29 of Act 388 of Public Acts of Michigan 1917, as amended, being Sec. 18.1000 of Mich. Stat. Annot.)

cating liquor to ordinary able-bodied men, and that there is no cause of action against a vendor of liquor in favor of those injured by the intoxication of the vendee.[8] The obstacles to the maintenance of such action at common law is (1) that it is not ordinarily actionable negligence to sell intoxicating liquor and (2) that the sale is not deemed to be the proximate cause of the injury.[9] Recovery is usually denied on the ground that the drinking of the liquor, rather than the furnishing thereof, was the proximate cause of the injury sustained.[10] In those states not having civil damage statutes, a few cases have allowed recovery, such as *Pratt* v. *Daly*, 55 Ariz. 535, 104 P. 2d 147, and *Swanson* v. *Ball*, 67 S.D. 161, 290 N.W. 482, where there is established a special duty toward persons having a peculiar interest in the buyers of intoxicating liquors,[11] such as a wife for her husband, but these are inapplicable to the case at issue.

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[8] 30 Am. Jur., Intoxicating Liquors, secs. 520 and 521; **Cherbonnier v. Rafalovich**, 88 F. Supp. 900; **Beck v. Groe**, 245 Minn. 28, 70 N.W. 2d 886; **Kingen v. Weyant**, 148 Cal. App. 2d (Adv. p. 686), 307 P. 2d 369; **Cruse v. Aden**, 127 Ill. 231, 20 N.E. 73; **Howlett v. Doglio**, 402 Ill. 311, 83 N.E. 2d 708; **Demage v. Feierstein**, 222 Wis. 199, 268 N.W. 210 (and many other cases cited therein.).

[9] See 130 A. L. R. 352, 358.

[10] See **Cherbonnier v. Rafalovich, supra**; **Fleckner v. Dionne**, 94 Cal. App. 2d 246, 210 P. 2d 530; **Beck v. Groe, supra**; **Belding v. Johnson**, 86 Ga. 177, 12 S.E. 804.

[11] These cases allowed recovery by analogy to cases (**Flandermeyer v. Cooper**, 85 Ohio St. 327, 98 N.E. 102; **Moberg v. Scott**, 38 S.D. 422, 161 N.W. 998) involving the sale of habit forming drugs to a husband after the wife had previously given prohibitory notice to the druggist. The rationale of these cases appears to be that the wife, by giving notice to the tavern keeper not to sell liquor to the husband imposes upon the bartender a duty owing to the wife to look after the welfare of his inebriate patron. If the saloonkeeper, having been warned by the wife, has actual knowledge of the patron's alcoholic tendency or lack of volition

It is contended by the court below that the case at issue is not within the sphere of the established common law rule, as it is alleged in the complaint that sales were made to intoxicated persons, and intoxicated persons are not "ordinary" or "able-bodied men" (Appendix A, *infra*, p. 5a). This is not a valid distinction, however. As pointed out by Judge Knoch, in his dissenting opinion, such a distinction "would, in effect, eliminate any reason for the enactment of the Dram Shop Act" (*id.*, *infra*, p. 8a).

Furthermore, it is apparent, from reading the decisions which established the common law rule, that the courts did not intend to exclude intoxicated persons from the category of "ordinary" or "able-bodied men". There is not a single case, so far as we can find, which has held a liquor vendor liable to those injured by an intoxicated person, on the mere allegation that the vendor made repeated sales to him or sold to him while he was intoxicated, even where the liquor was sold in violation of law. The only persons meant to be excepted from the designation of "ordinary" or "able-bodied men" are those who are *non compos* or who have permanently lost the volition to resist liquor, such as habitual drunkards.[12] An

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[11] (Continued)
to refuse to drink, he negligently breaches the duty to the wife by disregarding her request and selling liquor to the husband, from which the latter became intoxicated.

In the same category are the few cases (e.g. **Peck v. Gerber**, 154 Or. 126, 59 P. 2d 675 and **Schell v. Vergo**, 166 Misc. 389, 4 N.Y.S. 2d 644) holding tavern keepers liable for injuries to their patrons on the theory that they owe a special duty to them to see that they are not injured by intoxicated persons while they are on their premises.

[12] For a discussion of this, see **Cole v. Rush**, 45 Cal. 2d 345, 289 P. 2d 450.

"able-bodied and healthy" person has been defined as one in "ordinary health and strength in his *usual and habitual condition*" (italics ours). *Town of Starksboro* v. *Town of Hinesburgh*, 15 Vt. 200, 209. This would not exclude a man of ordinary health and strength who is on the occasion in question intoxicated.

Aside from the fact that the penal statute (sec. 131, Ch. 43, 1959, Illinois Revised Statutes), which makes sales to intoxicated persons unlawful, on which the court below relies, does not confer any rights for civil damages (as pointed out in the dissenting opinion), it does not impose any duty on defendants toward the plaintiffs.

The court below acknowledges that there is no actionable negligence at common law unless there is a failure of one owing a duty to another, but holds that this penal statute imposed a duty on defendants which they breached in making the sales in question (Appendix A, *infra*, pp. 5a-6a). This amounts to a finding that a breach of this penal statute is "negligence per se" or "negligence as a matter of law." We concede that some jurisdictions (and Michigan is among them) adhere to the rule that the violation of a penal statute may be "negligence per se", *but only as to those persons for whose protection or benefit the statute was enacted.*[13] One who bases his right of recovery for negligent injury on a violation of a statute must not only show a breach of duty imposed by the statute but he must also show that the person

[13] 38 Am. Jur., Negligence, sec. 158, note 21; Zajkowski v. American Steel & Wire Co., 258 F. 9, 12, 6 ALR 348; Steele v. Commercial Milling Co., 50 F. 2d 1037.

injured came within the purview of the statute."[14] The Illinois Liquor Control Act, of which said section 131 is a part, proclaims its purpose in section 94,[15] which declares that the "act shall be liberally construed, to the end that the health, safety and welfare of the *People of the State of Illinois* shall be protected. . . ." (italics ours). It is clear then that this statute imposes a duty for the protection or benefit of Illinois residents only and gives no right of action to plaintiffs who are residents of Michigan.

Furthermore, the doctrine that the violation of a penal statute may be "negligence per se" toward persons for whose protection and benefit the statute was passed, wherever followed, is always subject to the doctrine of "proximate cause". It applies only where the injuries were proximately produced by the act of violating the penal statute—that is, where the injuries arose directly from the chain of causation set in motion by the act of violating the penal statute, provided no independent act has intervened which was the real cause of the injury. 38 Am. Jur. Negligence, sec. 158, note 21; *Holmes* v. *Merson*, 285 Mich. 136, 140, 280 N.W. 139; *Warwick* v. *Blackney*, 272 Mich. 231. But at common law the drinking of the liquor—not the furnishing of it—is considered the proximate cause of injury suffered by third parties from the intoxication of the consumer.[16] For this reason

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[14] 31 Ill. Law and Practice, Negligence, sec. 31; **Brunnworth v. Kerens-Donnewald Coal Co.**, 260 Ill. 202, 103 N.E. 178; **Seghetti v. B. F. Berry Coal Co.**, 186 Ill. App. 263; **Gibson v. Leonard**, 143 Ill. 182, 32 N.E. 182 (city ordinance adopted for benefit of employees gives no right of action to injured person who is not employee.).

[15] Sec. 94, Ch. 43, 1959, Illinois Revised Statutes.

[16] See citations in footnote 10, infra, p. 10.

it has been consistently held that there is no cause of action against the vendor of liquor in favor of the injured party, even though the liquor was sold in violation of a penal statute.[17]

In states having civil damage statutes, allowing recovery of damages from the supplier of intoxicating liquor by those who sustain injury, the courts have uniformly held that no action for civil damages exists except that given by the civil damage statute, and that the remedy prescribed by such statute cannot be enlarged except by further legislative enactment. The decision of the court below in this case is in direct conflict with that prevailing view.

The recently published *per curiam* opinion of the Second District of the Illinois Appellate Court, in *Busser v. Noble, et al.*, 22 Ill. App. 2d 433, 444, 161 N.E. 2d 150, 155, poignantly points up this conflict.[17a] In several counts

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[17] **Busser v. Noble**, 22 Ill. App. 2d 443, 161 N.E. 150 (sale to a minor, in violation of sec. 131 of the Ill. Liquor Control Act—the same penal statute under consideration in the case at issue); **Rogers v. Dwight** (U.S. Dist. Crt. E.D. Wisc.), 145 F. Supp. 537 (sale to a known habitual drunkard, in violation of sec. 131 of the Ill. Liquor Control Act—the same penal statute under consideration in the case at issue); **Fleckner v. Dionne**, 94 Cal. App. 2d 246, 210 P. 2d 530 (illegal sale to a minor); **Seibel v. Leach**, 233 Wis. 66, 288 N.W. 774 (unlawful because made to a minor and intoxicated person); **Waller v. Collinsworth**, 144 Ky. 3, 137 S.W. 766 (violation of law in selling to minor and in selling in local option territory); **Britton v. Samuels**, 143 Ky. 129, 136 S.W. 143, 34 LRA (NS) 1036 (where sale unlawful because made in local option territory).

[17a] While the present case was based upon alleged sales to intoxicated persons and the **Busser** case was based upon alleged sales to a minor, the prohibitions are contained in the same section of the Illinois Liquor Control Act (sec. 131, ch. 43, Ill. Rev. Stat.). Accordingly the two cases appear to reach diametrically opposite results.

of the complaint plaintiff sought to recover damages from several tavern keepers, for personal injuries received in an automobile collision, on the ground that they sold intoxicating liquor to a minor in violation of the penal statute (sec. 131, ch. 43, Ill. Rev. Stat.). The trial court directed a verdict in favor of defendants with respect to the counts predicated upon said section 131 and the Appellate Court in affirming said:

> "The question whether a verdict should have been directed upon the counts based upon section 131 of the dram shop law prohibiting the sale of liquor to minors, also poses a difficult problem which apparently has never been passed upon by any court of review of this state. The closest case which has been called to our attention is that of *Rogers* v. *Dwight*, 145 F. Supp. 537, wherein the court was called upon to construe the Illinois law and to decide whether a complaint based upon section 131 stated a cause of action. The court held that a complaint based upon said section did not state a cause of action and that section 135 of the dram shop law affords an exclusive remedy. In *Howlett* v. *Doglio*, 402 Ill. 314, the Court indicated that recovery under section 135 is exclusive. By way of analogy, in *Hall* v. *Gillins*, 13 Ill. 2d 26, the Court declined to permit a death action to be brought as an action at common law rather than under the wrongful death statute. For these reasons we hold that section 135 affords exclusive remedies for damages under the dram shop law, and that the circuit was correct in directing a verdict for defendants in counts VI, VIII and XI."

In *Rogers* v. *Dwight*, D.C. (Wis.), 145 F. Supp. 537, a case factually close to the present case, and referred to in the *Busser* case, *supra*, the court held that the remedy provided in the Illinois Dram Shop Act (sec. 135, Ch. 43, Ill. Rev. Stat.) was exclusive and excluded an

action for civil damages under the penal statute (sec. 131, ch. 43, Ill. Rev. Stat.). One count of the suit involved a complaint by a mother and daughter, who were apparently residents of Wisconsin, against Illinois tavern keepers for damages suffered from lack of support, by reason of sales of liquor to the husband and father, in violation of the provision in said section 131 which prohibits sales to habitual drunkards.

The court, in said *Rogers* v. *Dwight* case, said:[18]

> "Defendants contend that Count II of the complaint does not state a cause of action in that Section 131, Chapter 43 of the Illinois Revised statutes is penal and does not provide for damages in a civil action, and that no such cause of action as pleaded existed at common law. It is the court's view that the contentions of the defendants are valid and that Count II should be dismissed for failure to state a claim upon which relief could be granted.
>
> "Although the Illinois courts apparently have never directly considered this issue, the Illinois courts have recognized that the common law gave no cause of action against a dram shop keeper for the intoxication of a patron, either on the theory of a direct wrong or on the ground of negligence. *Kreps* v. *D'Azostine*, 329 Ill. App. 190, 67 N.E. 2d 416. To the same effect is *Economy Auto Insurance Co.* v. *Brown*, *supra*, in which the court stated that the Dram Shop Act conferred two separate and distinct causes of action unknown at common law against persons who may have caused the intoxication. Civil damage acts were passed to supply a defect in the common law which afforded practically no remedy. 30 Am. Jur. Intoxicating Liquors, sec. 612.

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[18] 145 F. Supp. 537, 540.

"Section 131 as quoted heretofore is a regulatory or penal statute and is shortly followed by Section 135, the Dram Shop Act. *If Section 131 gave a cause of action for civil damages, then Section 135 was and is superfluous.* (Emphasis supplied.) In *Howlett v. Doglio, supra,* the court stated relative to Section 135:

> 'The liability imposed and the nature of the damage recoverable is of statutory origin, and is expressly and exclusively defined in the Dram Shop Act.'

The Court went on to say:

> 'Application of basic principles of statutory construction *forbids an enlargement of the classification of actionable injuries under the Dram Shop Act.* (Emphasis supplied.) A corollary to the rule that the enumeration of certain things in a statute implies the exclusion of all other things is that all exceptions or restrictions other than those designated are excluded under the rule *expresso unius excluso alterious.*'

"It is the decision of this Court that since the Illinois legislature grant d a new cause of action which had not previously ex ed at common law, the remedy provided therein is an clusive remedy and excludes any action for civil da ages under Section 131." (Emphasis supplied.)

In *Demage* v. *Feierstein,* 222 Wis. 199, 268 N.W. 210, where the widow of the deceased brought an action against a tavern keeper, seeking to recover damages for the sale of intoxicating liquor to her deceased husband, in violation of a penal statute which makes it illegal to sell to an intoxicated person, alleging that she requested the bartender not to sell liquor to her husband who was then in an intoxicated condition but that he continued to

do so, the court held that the complaint failed to state a cause of action, and remarked:[19]

> "In view of the common-law rule, it has been necessary, where opinion favored the creation of such a cause of action, to enact civil damage laws. . . .
>
> "The contention that civil damages resulting from the violation of sec. 176.35 (penal statute) may be recovered upon some common law principle cannot be sustained. Sec. 176.35 (civil damage statute) completely deals with the rights of action against the vendor of liquor by those sustaining damages as a result of intoxication following the sale. . . ."

In *Seibel* v. *Leach*, 223 Wis. 66, 288 N.W. 774, where plaintiff sought to impose civil liability on the basis of that part of the Wisconsin penal statute which prohibits sales to intoxicated persons, the court approved what was ruled in the *Demage* case, and illustrated its reluctance to allow civil damages in such cases by the following statement of its opinion:[20]

> "Courts may in proper instances apply old rules to newly created conditions, but they cannot create new rules for conditions already regulated."

In *Healy* v. *Cady*, 104 Vt. 463, 161 A. 151, 152, a case brought under a civil damage act, the court stated:

> "The statute was enacted to compel those who will hazard causing damage by furnishing intoxicating liquor to others to answer for such damage to those who may suffer it. It created a remedy for wrong where there was none before. . . .

---

[19] 222 Wis. 199, 203, 268 N.W. 210, 212.

[20] 233 Wis. 66, 68, 288 N.W. 774, 775.

"It should be borne in mind, too, that this statute by necessary implication changed the common law rule of proximate cause which obtains in other tort actions. . . ."

In *Kennedy* v. *Garrigan*, 23 S.D. 265, 121 N.W. 783, 785, the court said:

"No right of action exists save that expressly given by the statute, and the remedy prescribed cannot be enlarged except by further legislative enactment. . . ."

Under the now well established rule laid down by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, that federal courts must follow applicable state law, and subsequent decisions elaborating on said rule, the court below was not free to disregard the Illinois common law rule applicable to the situation, which has prevailed for many years and was finally confirmed and proclaimed with certainty in the said recent case of *Busser* v. *Noble*, 22 Ill. App. 2d 433, 161 N.E. 2d 150.[21] The Court below reached the conclusion that the common law of Michigan was applicable to the situation by decisions of courts other than Illinois courts (Appendix A, *infra*, p. 6a). This was in violation of the well settled rule that, under the doctrine of *Erie R. Co.* v. *Tompkins*, *supra*, federal courts, when deciding questions of conflict of laws in diversity of citizenship cases, must follow the rules prevailing in the state in which they sit. (See 21 A.L.R. 2d 247, 251 and the numerous cases cited

[21] It has been firmly established that the rule of **Erie R. Co. v. Tompkins** applies to decisions of intermediate state courts as well as to law expounded by the highest court of the state. See e.g. **Fidelity Union Trust Co. v. Field**, 311 U.S. 730, 61 S. Ct. 438 (rehearing denied in 314 U.S. 709, 62 S. Ct. 118) and **West v. American Teleph. & Teleg. Co.**, 311 U.S. 223, 61 S. Ct. 179.

therein). Under Illinois law, the conflict of laws rule requires the application of the law of the state where the act, claimed as the basis of a tort, occurred, in determining whether there is a tort as a legal consequence, or whether the conduct was of a tortious character. *Ferroline Corp.* v. *General Aniline & Film Corp.*, 207 F. 2d 912, certiorari denied 347 U.S. 979, 74 S. Ct. 784 and 348 U.S. 851, 75 S. Ct. 19; *Addressograph-Multigraph Corp.* v. *American Expansion Belt & Manufacturing Co.*, 316 U.S. 682, 62 S. Ct. 1270; *Smith* v. *Dravo Corp.*, 203 F. 2d 369. The acts claimed as a basis for the torts in the present case are the acts of selling liquor to intoxicated persons in violation of an Illinois penal statute—acts which occurred exclusively in Illinois. The wrongs, if such they be, were the sales in Illinois, and the court below should have applied Illinois law.

But even if Michigan law were properly applicable, the decision of the court below would nevertheless be in violation of the *Erie R. Co.* v. *Tompkins*, *supra*, rule. The court below does not set forth any convincing reasons to indicate that the common law of Michigan is otherwise than the general common law principle applicable to the situation which all other states adhere to. To the contrary, the fact that the question has apparently never been passed upon by any Michigan Court of review, is an indication that the applicable law of Michigan is not different from the settled common law rule followed by other states. In the guise of interpreting the law of Michigan, the court below has really given its own concept of what it thinks the law of Michigan should be, not what it is. This is a reversion to the doctrine of *Swift* v. *Tyson*, 16 Pet. 1 (1842), which the case of *Erie R. Co.* v. *Tompkins*, *supra*, overruled.

This disregard by the court below of the common law rule of Illinois, in deciding the question at issue, has created practical problems of great importance in the uniform administration of justice. If the decision would be allowed to stand, there would be one rule for litigants who bring the issue before state courts and another rule for litigants who bring the same issue before Federal Courts owing to the circumstances of diversity of citizenship. As pointed out by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 75-80, 58 S. Ct. 817, 820-825, this would introduce "grave discrimination by non-citizens against citizens"; render "impossible equal protection of the law", and prevent "uniformity in the administration of the law of a state", thereby invading "rights which are reserved by the constitution to the several states".

CONCLUSION.

The question of liability of tavern keepers in cases like the present is an important state question, because it involves a determination as to which is deserving of the most protection—the property interest of a tavern keeper from rather stringent liability as against the personal and property interests of the public from invasion by intoxicated persons.

By well settled principles of law, state courts have left this important question to be decided by the legislature. According to applicable state law, if it is deemed socially desirable to impose such stringent liability on tavern keepers for the benefit of the public, the legislature must enact a civil damage act broad enough to shelter such people as the plaintiffs in this case.

The decision below is in direct conflict with this prevailing view, because it created liability for tavern keepers in cases like the present by judicial interpretation. In doing so it has violated the rule of this Court that Federal Courts must follow state law, introduced serious discrimination by non-citizens against citizens, unsettled the entire concept of tort liability on the part of furnishers of intoxicating liquor, and created many important problems in that field.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD ORLINSKY
MORRIS SAXNER
Counsel for Philip Saxner and Rubin Saxner

SEYMOUR J. LAYFER
Counsel for Chicago's Last Department Store.

January 1960

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12563 SEPTEMBER TERM, 1958, APRIL SESSION, 1959.

MARY ANN WAYNICK, et al.,
Plaintiffs-Appellants,
v.
CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 20, 1959

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a diversity action, filed in the district court at Chicago, Illinois, by citizens and residents of the state of Michigan against citizens and residents of the state of Illinois, plaintiffs Mary Ann Waynick, Wilma Ann Scruggs, and Carl Mack Waynick, Linda Kay Waynick, Nellie Sue Waynick and Alice Faye Waynick, minors, by Mary Ann Waynick, their mother and next friend, sought recovery of damages sustained by them, when an automobile under the control of Bruce Sims, its owner, and driven by Johnie E. Owens, collided on U.S. Highway 112 in the state of Michigan with an automobile driven by William Gerald Scruggs, who was killed in the collision. Plaintiffs' complaint named as

defendants Chicago's Last Department Store, an Illinois corporation, Philip Saxner and Rubin Saxner, doing business as Phil's Tavern, and William Turbin, doing business as Matlan Liquors, who were engaged in the business of selling and furnishing intoxicating liquors in the state of Illinois.[1]

It appears from the complaint that Chicago's Last Department Store's premises are situated in Chicago, Illinois, near the Indiana-Illinois state boundary, where said defendant has a large parking lot and caters to drive-in trade and extends an invitation to persons upon the public highway to purchase its wares, and that said defendant permitted said Sims and Owens to consume a large quantity of intoxicating liquor in its parking lot. The complaint further alleges that from 4 P.M. on July 28, 1956 to after midnight of said day, defendants Chicago's Last Department Store, the Saxners and Turbin sold and furnished intoxicating liquor to Sims and Owens, when they were intoxicated, and thus did contribute to their said intoxication, the liquor being furnished in large quantities both by the glass and by carry-out bottles, which intoxication resulted in and was the proximate cause of severe personal injuries and loss of means of support to plaintiffs.

The Saxners moved to dismiss the cause, for failure of the complaint to state a claim, while Chicago's Last Department Store and Turbin moved for judgment on the pleadings, on several grounds, including the following:

> "4. Insofar as the plaintiffs' grievances are predicated upon this defendant's violation of a common law duty, if any, owing by it to plaintiffs as is implicitly asserted in paragraphs 12 and 19, the complaint fails to state a cause of action against this defendant because:

---

[1] The complaint also named as defendants, Harold Harris, lessor of said Philip Saxner and Rubin Saxner, doing business as Phil's Tavern, and Marie Movilli, lessor of said William Turbin, doing business as Matlan Liquors. Said lessors have not appeared in this court on appeal.

a. At common law it is not actionable to sell alcoholic liquor to an adult; the common law gives no remedy for injury following the sale of intoxicating beverages to an ordinary man.

b. Having created a right of action by enacting the Dram Shop Act, the General Assembly of Illinois has preempted the field."

From the court's order sustaining defendants' motions, plaintiffs have appealed. They rely for relief, in the alternative, on (1) §§ 22 and 29 of the Michigan Liquor Control Act,[2] (2) § 14 of the Illinois Dram Shop Act, or (3) the common law.

It is our view that plaintiffs' reliance on either the Michigan act or the Illinois act rests upon such dubious grounds that we are impelled to reject those acts as a basis for our decision in this case. That leaves for us to decide whether the common law supports plaintiffs' cause of action. Before considering that question, we feel it proper to point out that the Illinois Dram Shop Act has been held not to apply extraterritorially to a situation where the sale of intoxicating liquor takes place in Illinois and the injury resulting therefrom occurs in another state. *Eldridge* v. *Don Beachcomber, Inc.*, 342 Ill. App. 151, 154, leave to appeal denied, 346 Ill. App. xiv. It appears to us that it is also probable that the Michigan Liquor Control Act is not applicable where a sale of intoxicating liquor in Illinois produces injuries in Michigan. Defendants so argue in this court and cite a Michigan court decision to support their contention. It would seem to follow that the practical consequence of denying extraterritorial effect to such acts is to leave a vacuum in the law insofar as unlawful sales of intoxicating liquor in one state produce injuries to third persons in another state. Certainly the position of defendants in this court is that the liquor control acts of Illinois and Michigan do not cover such a case.

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[2] 13 Mich. Stat. Ann. (1957) §18.993 and 18.1000.

[3] § 135, ch. 43, R.S. Ill. 1951.

It seems to us, therefore, that their contention that the Illinois Dram Shop Act has "preempted the field", is unsound. Rather it would appear that the Act has avoided the field, rather than preempted it. If the common law does not cover the situation before us, there is actually no law applicable. As Aristotle said, nature abhors a vacuum: so does the law. Lest we too hastily reject the claim of these plaintiffs for pecuniary redress for death and injuries sustained in what was evidently an appalling automobile accident, we turn to the common law, which is in effect in the state of Michigan where the injuries occurred. The law of that state governs the tort liability asserted by plaintiffs herein. As was said in 133 A.L.R. 263:

> "• • • where the question relates to the choice between the law of the place where the negligent act or omission took place and the law of the place where the injury or death or both were inflicted, by the almost unanimous consensus of decision the place of the tort, within the contemplation of the rule that the law of the situs of the tort governs the liability and substantive matters, is the place where the injury or death was inflicted and not the place where the negligent act or omission took place."

In *Stout* v. *Keyes* (Mich.) 2 Douglas 184, 43 Am. Dec. 465, at 467, it was held that the common law applies in Michigan and that

> "• • • a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action: • • •."

The injury having occurred in Michigan as a result of defendants' acts in Illinois, the common law of Michigan as to tort liability controls.

The sale of intoxicating liquors to Owens and Sims was unlawful when made in Illinois, according to the applicable Illinois statute, § 131, ch. 43, R.S. Ill. 1951, which provides:

"No licensee nor any officer, associate, member, representative, agent, or employee of such licensee shall sell, give or deliver alcoholic liquor * * * to any intoxicated person * * *."

Said § 131 provides for fine or imprisonment or both, upon conviction.

In 130 A.L.R. 357, it is stated:

"While it is true that ordinarily a vendor of intoxicating liquors is not, at common law, answerable to a third person for injury or damage sustained by the latter as a result of the intoxication of the purchaser of the liquor, nevertheless it is established that in some circumstances a vendor's sale of liquor may constitute a wilful violation of his duty to one other than the consumer thereof and be the proximate cause of the injury sustained by such third person, so that for such injury the latter may have a right of action at common law against the vendor."

It is apparent in the case at bar that there are circumstances which make the sales of liquor to Sims and Owens wilful violations of § 131. These circumstances were not usual sales to adults or ordinary men. They were sales to intoxicated persons. They were not sales to "a strong and able-bodied man", as referred to in *Manthei* v. *Heimerdinger*, 332 Ill. App. 335, 352, 75 N.E. 2d 132, relied on by defendants.

Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him. 65 C.J.S. 340.

One essential element in a tort is the existence of a duty imposed by statute or otherwise in favor of the party injured and on the party whose conduct produces the injury. 86 C.J.S. 926. The duty, breach of which may constitute negligence, may be a duty to the person injured as an individual, but this is not essential, since it is sufficient that the duty was owed to him as a member of a class or group. 65 C.J.S. 348.

The Illinois act making unlawful the sale of alcoholic liquor to any intoxicated person is for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholic liquor contributes. Obviously the plaintiffs in the case at bar are entitled to the protection given by § 131 of the Illinois Act.

It will be noted that, in availing themselves of that protection, plaintiffs are in no way relying upon those parts of the Illinois act imposing civil damage liability (which was unknown to the common law), resulting from lawful sales of intoxicating liquor to a competent person, commonly known as dram shop act cases.

The effect of § 131 of the Illinois act is that a sale of alcoholic liquor cannot lawfully be made to an intoxicated person. This is not inconsistent with the right of any competent adult to buy alcoholic liquor and § 131 does not prohibit a sale to the latter.

In applying the common law to the situation presented in this case, we must consider the law of tort liability, even though the chain of events, which started when the defendant tavern keepers unlawfully sold intoxicating liquor to two drunken men, crossed state boundary lines and culminated in the tragic collision in Michigan. We hold that, under the facts appearing in the complaint, the tavern keepers are liable in tort for the damages and injuries sustained by plaintiffs, as a proximate result of the unlawful acts of the former. The court erred in its order dismissing the cause as to Chicago's Last Depart-

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[1] **Hunter, Admr. v. Derby Foods, Inc.**, 110 F.2d 970, 972, 133 A.L.R. 255, 258; **Alabama Great Southern R. Co., v. Carroll**, 97 Ala. 126, 11 So. 803; **Cameron v. Vandergriff**, 53 Ark. 381, 13 S.W. 1092; **El Paso and N.W. Ry. Co. v. McComas** (1903 Tex. Civ. App.), 72 S.W. 629; **Conn. Valley Lumber Co. v. Maine Central R.R.**, 78 N.H. 553, 103 A. 263; and **Darks v. Scudders-Gale Grocer Co.**, 146 Mo. App. 246, 130 S.W. 430, affirmed, 153 S.W. 1199.

ment Store, an Illinois corporation, Philip Saxner and Rubin Saxner, doing business as Phil's Tavern, and William Turbin, doing business as Matlan Liquors, and to that extent the order appealed from is reversed and this cause is remanded to the district court for further proceedings not inconsistent with the views herein expressed. As to the defendants Harold Harris and Marie Movilli, the order of the district court is affirmed.

IN PART, AFFIRMED AND,
IN PART, REVERSED AND
REMANDED WITH DIRECTIONS.

KNOCH, dissenting. I find myself in agreement with my distinguished colleagues that neither the Michigan nor the Illinois Dram Shop Acts apply and that the Michigan common law governs. I am also in agreement that under Illinois law the Illinois Dram Shop Act cannot be said to have any extraterritorial coverage. *Eldridge* v. *Don. Beachcomber, Inc.*, 342 Ill. App. 151.

The majority holds that the common law by virtue of the penal statute (Sec. 131, Ch. 43, 1951 Illinois Revised Statutes, which makes sales of liquor to intoxicated persons unlawful) gives a civil right of action in tort against the sellers. With this conclusion I cannot agree.

It should be noted that this is a penal statute providing for the punishment of those selling to intoxicated persons and thereby is of general good to the public. It confers no specific rights to private individuals.

> "It was not a tort, at common law, to either sell or give intoxicating liquor to 'a strong and able-bodied man,' and it can be said safely, that it is not anywhere laid down in the books that such act was ever held, at common law, to be culpable negligence, that would impose legal liability for damages upon the vendor or donor of such liquor." *Cruse* v. *Aden*, 127 Ill. 231, 234 (1889).

I cannot accept the distinction made—that an intoxicated person is not an "able-bodied man"—because that would, in effect, eliminate any reason for the enactment of the Dram Shop Act.

The majority opinion states that "If the common law does not cover the situation before us, there is actually no law applicable . . . nature abhors a vacuum; so does the law."

Prior to the enactment of the Dram Shop Act, tavern keepers and owners had no liability. By the same reasoning, one can say that a total and absolute vacuum prevailed as to them. However, the common law has always held accountable those responsible for direct injury to the person or property of another. This is true in the instant case. There is no bar to proceeding against the driver and the owner of the car in question.

It may be socially desirable to hold tavern keepers and owners responsible under the circumstances in this case, but that result, I believe, should be achieved through Congressional act, rather than by judicial interpretation.

The trial court's order dismissing the complaint not only as to the owners but also as to the tavern keepers is correct and should be affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

July 20, 1959

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Wm. G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

MARY ANN WAYNICK, et al.,
Plaintiffs-Appellants,
v.
CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED as to that part of the judgment which dismissed the cause as to Chicago's Last Department Store, an Illinois Corporation, Philip Saxner and Rubin Saxner, doing business as Phil's Tavern, and William Furbin, doing business as Matlan Liquors, and to that extent this cause is REMANDED to the District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day, and the costs herein are taxed against the parties in this paragraph named.

It is further ordered and adjudged by this court that, as to the Defendants Harold Harris and Marie Movilli, the judgment of the said District Court is AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

September 1, 1959

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win. G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

MARY ANN WAYNICK, et al., *Plaintiffs-Appellants,* v. CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for rehearing, filed by the Appellee's herein be, and the same is hereby, DENIED.

APPENDIX D.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1959

PHILIP SAXNER and RUBIN SAXNER,
Petitioners,

vs.

MARY ANN WAYNICK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

January 14th, 1960.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 1st
day of December, 1959.

APPENDIX E.

Section 135 of the Illinois Liquor Control Act, Chapter 43, Illinois Revised Statutes, 1955, provides:

"135. Actions for damages caused by intoxication—Lessor's liability—Forfeiture of lease—Maximum recovery—Limitations. Every person, who shall be injured in person or property by any intoxicated person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally and jointly, with the person or persons selling or giving liquors aforesaid, as hereinafter provided; and a married woman shall have the same right to bring suit and to control the same and the amount recovered as a feme sole; and all damages recovered by a minor under this Act shall be paid either to such minor, or to his or her parent, guardian or next friend as the court shall direct; and the unlawful sale, or giving away, of alcoholic liquor shall work a forfeiture of all rights of the lease or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this Act may be by any appropriate action in any of the courts of this State having competent jurisdiction. An action shall lie for injuries to means of support, caused by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, resulting as aforesaid. Such

action shall be brought by and in the name of the person injured or the personal representative of the deceased person, as the case may be, from whom said support was furnished, and the amount recovered in every such action shall be for the exclusive benefit of the person or persons injured in loss of support, and shall be distributed to such persons in the proportions determined by the judgment or verdict rendered in said action. Recovery under this Act for injury to the person or to the property of any person, as aforesaid, shall not exceed $15,000.00 and recovery under this Act for loss of means of support resulting from the death or injury of any person, as aforesaid, shall not exceed $15,000.00 for each person so injured where such injury occurred prior to the effective date of this amendatory Act of 1955, and not exceeding $20,000.00 for each person so injured after the effective date of this amendatory Act of 1955; provided that every action hereunder shall be barred unless commenced within one year next after the cause of action accrued. As amended 1949, Aug. 10, Laws 1949, p. 861 S.1; 1955, July 14, Laws 1955, p. 1961, S.1. Effective July 1, 1956."

APPENDIX F.

Section 22 of Act 338 of Public Acts of Michigan 1917, as amended, Section 18.993 of Michigan Statutes Annotated, provides in part as follows:

". . . Every wife, husband, child, parent, guardian or other persons who shall be injured in person or property, means of support or otherwise, by an intoxicated person by reason of the unlawful selling, giving or furnishing to any such persons any intoxicating liquor, shall have a right of action in his or her name against the person who shall by such selling or giving of any such liquor have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury, and the principal and sureties to any bond given under this law shall be liable, severally and jointly, with the person or persons selling, giving or furnishing any spirituous, intoxicating or malt liquors as aforesaid, and in any action provided for in this section, the plaintiff shall have the right to recover actual and exemplary damages in such sum not less than $50.00 in each case as the court or jury may determine; Provided, That no surety shall be liable in excess of the amount of the bond required by this act. In case of the death of either party, the action or right of action or right of action given in this section shall survive to or against his or her executor or administrator, and in every such action by a husband, wife, child or parent, the general reputation of the relation of husband and wife, parent and child shall be *prima facie* evidence of such relation, and the amount so recovered by either husband or wife, parent or child, shall be his or her sole and separate property. Such damages together with the costs of suit shall be recovered in an action of trespass on the case before any court of competent jurisdiction and in any case where the parent shall be entitled to any such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other."

FILE COPY

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now come the respondents-plaintiffs below, Mary Ann Waynick, Wilma Ann Scruggs, Carl Mack Waynick, a minor, by Mary Ann Waynick, his mother and next friend, Linda Kay Waynick, a minor, by Mary Ann Waynick, her mother and next friend, Nellie Sue Waynick, a minor, by Mary Ann Waynick, her mother and next friend, and Alice Fay Waynick, a minor, by Mary Ann Waynick, her mother and next friend, and in opposition to the Petition for a Writ of Certiorari filed by the defendants, Philip Saxner and Rubin Saxner and Chicago's Last Department Store, an Illinois corporation, respectfully request this Honorable Court to deny said Petition.

For the purpose of clarity and brevity, the respondents will follow the general outline selected by the petitioners

AS TO THE JURISDICTION OF THIS COURT.

The respondents acknowledge the jurisdiction of this Court with respect to the considerations contained in the Petition as presented to this Court.

AS TO THE QUESTION PRESENTED.

Under this heading the defendants have portrayed the decision of the Circuit Court of Appeals as standing for the proposition that there is a common law right of action against a vendor of liquor who sells to an intoxicated vendee, in violation of a penal statute, in favor of those injured by the intoxication of the vendee, in jurisdictions which have dram shop or civil damage statutes. The respondents view this interpretation of what the Court of Appeals decided as far too broad in scope, in that every decision must be uttered in the light of the facts upon which that decision is rendered. It would appear that the decision rendered below was guided by the significant considerations that the liquor in question was sold and consumed in Illinois and the injury proximately flowing from such sale and consumption culminated in Michigan; that neither the Illinois statutes nor the Michigan statutes which concern themselves with dram shop or civil damage recoveries could be interpreted as covering a situation as existed in the instant case; that upon the common law principle that for every wrong there ought to be a remedy the court applied that principle to permit recovery. Likewise the petitioners in sensitizing the "common law right of action" to the "violation of a penal statute" ignored the relationship of that violation to those considerations of "due or ordinary care" and negligence as viewed by the common law.

AS TO THE STATUTES INVOLVED.

In addition to the statutes cited under this topic at Pages 2 and 3 of the Petition for Writ of Certiorari as well as the statutes as set forth in full in Appendix E and F of that Petition, another statute mentioned by the petitioners at Page 9 and Footnote 7 is worthy of quotation, namely Section 290, Act 388 of Public Acts of Michigan, 1917, as amended, Section 18.1000 of Michigan Stat. Annot., page 455, Vol. 13, which is as follows:

> "Gifts; sales to intoxicated person. Sec. 29. No vendor shall give away any alcoholic liquor of any kind or description at any time in connection with his business except manufacturers for consumption on the premises only. No vendor shall sell any alcoholic liquor to any person in an intoxicated condition. (C.L. '48, 436.29.)"

AS TO THE STATEMENT OF THE CASE.

Respondents take no issue with the statement as outlined by the Petitioners except that they call the Court's attention to the interstate character of the occurrence, namely the sale of liquor in Illinois to persons already intoxicated and the ultimate collision by the automobile operated by those intoxicated persons with the automobile in which the plaintiffs were riding in the State of Michigan resulting in the decimation of two families by death and injuries. This feature is further illustrated by the allegations in the Complaint against Chicago's Last Department Store, one of the petitioners, wherein it was stated that the liquor store's location near the Illinois boundary line and its proximity to the highway emphasized the gravity in selling liquor to those already intoxicated, where it was apparent that their automobile will be operated in interstate travel. The respondents also differ

with the interpretation of the petitioners as regards the decision in the Court of Appeals whereby the petitioners limit the impact of the Court's decision as being wholly dependent upon the violation of Sec. 131 of Illinois Liquor Control Act for the total cause of action. The respondents in their reading of the decision interpret the Court's reference to that section as indicative of the duty or standard that the common law would impose upon one selling intoxicating liquor to a person already intoxicated and that such a sale is violative of the "general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him".

The court went on to state that "in applying the common law to the situation presented in this case, we must consider the law of tort liability, even though the chain of events which started when the defendant tavernkeeper unlawfully sold intoxicating liquor to two drunken men crossed state boundary lines and culminated in the tragic collision in Michigan."

AS TO THE REASONS RELATED FOR GRANTING THE WRIT.

The petitioners exhort this Court to grant the Petition for a Writ of Certiorari on the following dichotomy:

1. "This is a case of novel impression."

2. "The cases are overwhelmingly to the effect that in the common law it is not considered a tort to sell intoxicating liquor to ordinary able-bodied men and that there is no cause of action against a vendor of liquor in favor of those injured by the intoxication of the vendee."

These headings belie the propositions advanced in support of them. To attack the morass of citations and

propositions advanced by the petitioners would extend this response beyond its function. The most significant intimation of the petitioners is that in some manner the Court of Appeals failed in its obligation to follow the rule laid down by *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, namely that no federal common law exists in diversity cases and that the Federal Court must apply the substantive law of the state in which the Federal Court sits. Such an application of the substantive law requires the Federal Courts to apply the conflict of laws rule of the state in which it sits as it affects the fact situation under scrutiny. In the Case of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477, 61 Sup. Ct. 1020, the Court declared:

> "We are of opinion that the prohibition declared in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of conformity within a state upon which the Tompkins decision is based."

In the *Waynick* Case the collision of the vehicle operated by the intoxicated person and the vehicle in which the plaintiffs were riding occurred in Michigan.

Under Illinois law it is undisputed so far as the conflict of laws question is concerned that Illinois will apply the law of the place where the tort occurred. When the Illinois Supreme Court was faced with such a question they de-

clared in the case of *Mithen* v. *Jeffery*, 259 Ill. 372 at page 376, 102 N.E. 778.

> "The injury to the plaintiff occurred in the State of Wisconsin and the rights and duties of the parties were to be determined by the laws of that state which regulated their relations to each other."

To the same effect are the cases of *Christiansen* v. *William Graver Tankworks*, 223 Ill. 142, 79 N.E. 97, *Opp* v. *Pryor*, 294 Ill. 538, 128 N.E. 580.

Therefore, a Federal Court sitting in Illinois and following the rule of law applicable in Illinois would be under an obligation to apply the common law of the State of Michigan in determining the relative rights, obligations and duties of the parties to the action. This is precisely what the Court of Appeals did.

It is equally basic that where acts or omissions occur in one state and the injury occurs in another, the law of the state where the injury was inflicted will command. This is precisely what the Court of Appeals did.

The question is broadly discussed in The American Law Reports, Volume 133 beginning at page 263, and where it is stated:

> "Where the question relates to the choice between the law of the place where the negligent act or omission took place and the law of the place where the injury or death or both were inflicted, by the almost unanimous consensus of decision the place of the tort, within the contemplation of the rule that the law of the situs of the tort governs the liability and substantive matters, is the place where the injury or death was inflicted and not the place where the negligent act or omission took place."

The cases of *Hunter, Admr.* v. *Derby Foods, Inc.*, 110 F.2d 970, 972, 133 A.L.R. 255, 258; *Alabama Great South*

ern R. Co. v. *Carroll*, 97 Ala. 126, 11 So. 803; *Cameron* v. *Vandergriff*, 53 Ark. 381, 13 S.W. 1092; *El Paso and N.W. Ry. Co.* v. *McComas* (1903 Tex. Civ. App.), 72 S.W. 629; *Conn. Valley Lumber Co.* v. *Maine Central R.R.*, 78 N.H. 553, 103 A. 263; and *Darks* v. *Scudders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430, affirmed, 153 S.W. 1199, exemplify this rule.

The barren declaration of the petitioners that the Illinois conflict of laws rule is to the contrary without citation of any Illinois cases to support their position, does not alter the impact of the law and its application in this case.

Next under the Erie doctrine it has been held that in the absence of any decision by the State Supreme Court that if the Appellate Courts of that state have passed upon the question, the Federal Courts are obliged to follow their decision. *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 236, 237, 61 Sup. Ct. 170, 183, 85 L.Ed. 139, 132 A.L.R. 956. The Supreme Court further indicated in the case of *King* v. *Order of Travelers*, 333 U.S. 153, 92 L.Ed. 608, 68 Sup. Ct. 488 that where neither the State Supreme Court nor State Appellate Courts have spoken, Federal Courts are not necessarily bound by the state trial courts. Further, in the wake of the *Erie* case, where neither the State Supreme Court nor the State Appellate Courts have decided the precise question facing the Federal Court, the duty devolves upon that Court to examine the state law in general and apply it to the facts at hand. *Meridith* v. *City of Winter Haven*, 320 U.S. 228, 234, 64 Sup. Ct. 70, 88 L.Ed. 9, *Forsgren* v. *Gillioz*, 110 F.Supp. 647, 651.

All of this the Court did in the instant case. It inspected and applied the common law of Michigan and

gleaned from it the rule that "there is a general principle of the common law, that whenever the law gives a right or prohibits injury, it also gives a remedy by action; . . ." citing *Stout* v. *Keyes*, Michigan 2 Doug. 184, 43 Am. Dec. 465 at 467. It then fathomed the purport of the common law and declared that "every person has a general duty to use due care or ordinary care not to injure others . . .". In evaluating the duty that was owed by the petitioners to the respondents the Court related that in the very state where the sale occurred that sale was unlawful and as such violated the social and legal conception of what constituted reasonable care and due caution. The Court of Appeals declared in essence, that the defendants were guilty of a common law tort and that under the common law, actionable negligence is the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to another.

What gleanings do exist in Michigan law upon which the Court of Appeals has decided that a common law right of action exists in favor of the plaintiffs in the instant case?

The standard of wrongful conduct has since 1868 been defined by the Michigan Supreme Court in the case of *Detroit and Milwaukee Railroad Co.* v. *Van Steinburg*, 17 Mich. Rep. 99. There, in discussing the role of contributory negligence, the court defined negligence at page 118 as follows:

> "Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing

circumstances, in view of the probable danger of injury. The injury is, therefore, one which must take into consideration all these circumstances and it must measure the prudence of the party's conduct by a standard of behaviour likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem can not usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

The reverence with which this definition is held is exemplified by the recent Michigan Supreme Court opinion in the case of *Clark* v. *Shefferly*, 346 Mich. 332, 78 N.W. 2d. 155, at page 159 where the court declared:

"Van Steinburg gives us the very cynosure to the law of contributory negligence as originally adopted in this state. When we return to its course, much of our present difficulty with questions of law and fact assigned to contributory negligence will automatically disappear. Probably no Michigan case has been cited more universally, and followed with greater reverence, by the courts of the respective states and the courts of the United States, than Van Steinburg. It will do us no harm to partake again of its nourishment."

In the instant case where liquor was furnished by the defendants to persons already intoxicated, is it not want of due care to so furnish that liquor well knowing that the attributes that bespeak a careful driver have been destroyed and impaired by the drugging of the mind by alcohol? Is not the tortious conduct of the furnisher of alcohol to one already intoxicated the proximate cause of the injury suffered by those on the highway whose automobile was smashed by that of the drunkard? Is it not predictable? Is it not foreseeable? Can the wrongful conduct of the furnisher in such circumstances be destroyed by the negligence of the drunkard in operating his car when that negligence can be anticipated?

In discussing 'proximate cause' the Supreme Court of Michigan held in the case of *Parks* v. *Starks*, 342 Mich. 443, 70 N.W. 2d. 805, where nine hours prior to the injuries sustained by the plaintiff the defendant motorist had knocked out the supporting pillar of a canopy which ultimately fell upon the plaintiff. Said the Court, quoting from other authorities:

> "'The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural and continuous sequence between an act and an injury * * * the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance.'
>
> * * *
>
> 'In order that the plaintiff may recover it must appear that his injury was the natural and probable consequence of a negligent act or omission of the defendant, which under the circumstances an ordinarily prudent person ought reasonably to have foreseen or anticipated might possibly occur as a result of such act or omission. * * *'".

Was not the furnishing of such liquor and its consequences foreseeable or to be anticipated in the present case?

Also of significance is the decision in *Berry* v. *Visser*, 354 Mich. 38, 92 N.W. 2nd 1 where the Court held at page 5, as follows:

> "'(3, 4) To this we add that requested jury instructions which, in their proposed application to a factual situation as at bar, do not take into account the element of foreseeability of a third party's negligence, are properly rejected. This merely complements the general rule that an intervening negligent act of a third person is not a superseding cause, if in the given case, the defendant at the time of his negligent conduct should have realized or anticipated that a third person might so negligently act or proceed. Such is the pith of Restatement, Torts, 447, pp. 1196, 1197; likewise the trend of the times. Professor James has recently written for us, under the title 'Practical Changes in the Field of Negligence' and under the heading 'Expanding Notions of What Is Foreseeable' (37 MSBJ, No. 8, August, 1958, pp. 10, 13):
>
> 'There has been an increasingly broad recognition of foreseeability of harm in situations where, at the turn of the century, courts were likely to deny negligence as a matter of law. Thus, there was formerly considerable reluctance to regard intervening wrongful or criminal acts as foreseeable in law, while today, most courts have no such reluctance where foreseeability is indicated as a matter of fact by the evidence."

The petitioners by their own admission confess that the question apparently has never been passed upon by any Michigan Court of review and refine from this the extraordinary postulate that such absence is an indication that

the applicable law of Michigan precludes a common law recovery in a fact situation such as we have here. Such a conclusion seems violative of all rules of reason for to imply that because the question was never raised, remembering that the sale of liquor to one already intoxicated in one state does not frequently produce injuries in another state resulting in litigation, no application of time tested common law principles can be made. Such an approach begs the question and chains the common law to a tree that never grows.

The petitioners contend in their brief, in effect, that the Court of Appeals had no right of determining what Michigan law was, in that it arrived at a conclusion diametrically opposed to settled law to the effect that "There was generally considered to be no remedy for damages against a vendor for liquor in states which had no civil damage statutes and that the cases are overwhelming to the effect that at common law it was not considered a tort to sell intoxicating liquor to ordinary able-bodied men." These contentions pinpoint the arguments of the petitioners to the direction not so much that the decision of the Court of Appeals was a case of novel impression or of federal significance so as to invite inspection by this Court but rather that the Court of Appeals in assessing the law and inspecting the general fundamentals of common law of Michigan was wrong. The defendants preferred to describe the decision of the Court of Appeals as one of "'compassion" for the plaintiffs' cause as opposed to being a lucid determination of what was right, what was fair, what was just, and what was the law under all of the circumstances in the case.

It is of sober significance that the Supreme Court of New Jersey on November 23, 1959, in evaluating the general principles of the common law as they applied in a

situation less imperative than the one in the instant case arrived at a decision four square and then some with the decision of the Court of Appeals in the *Waynick* case. In the case of *Rappaport* v. *Nichols*, 156 A. 2nd 1, the Supreme Court of New Jersey had before it a situation involving the plying of a minor with alcoholic beverages which resulted in the collision of the minor's car and the plaintiff's automobile. Parenthetically, it ought to be stated that the State of New Jersey had no civil damage act, the same having been repealed with the demise of Prohibition. The court at great length inspected cases such as those cited by the petitioners and the propositions for which they stand; it inspected "dutjes" and the cases connected therewith; it inspected "proximate causation" and the cases connected therewith; it inspected the general doctrines of negligence and concomitantly reasonable care and all due caution; it inspected regulations forbidding the sale of liquor to minors or to those who are intoxicated; it inspected the "burden" placed upon the industry; it inspected the *Waynick* case and commended its result. In short, it did what the petitioners ask this Court to do and it declared at Pages 8 and 9:

> "When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent . . . If the patron is a minor or is intoxicated when served, the tavern keeper's sale to him is unlawful; and if the circumstances are such that the tavern keeper knows or should know that the patron is a minor or is intoxicated, his service to him may also constitute common law negligence. In

view of the standard of conduct prescribed by the statute and the regulation a tavern keeper's sale of alcoholic beverages when he knows or should know that the patron is a minor or intoxicated may readily be found by the jury to be imprudent conduct. While the plaintiff here may introduce evidence that the defendants knew or should have known that Nichols was a minor, or intoxicated when served, and may avail herself of the violations of the statute and the regulations as evidence of the defendants' negligence, each of the defendants is at liberty to assert that it did not know or have reason to believe that its patron was a minor, or intoxicated when served, and that it acted as a reasonably prudent person would have acted at the time and under the circumstances . . ."

Thereby seven justices declared for a common law recovery with none opposed resulting in the reversal of the judgment below in favor of the tavernkeeper.

Common law recoveries have equally been allowed where intoxication was the precipitating cause of injury in the cases of *Pratt* v. *Daly*, 55 Ariz. 535, 104 P.2d. 147, *Swanson* v. *Ball*, 67 S.D. 161, 290 N.W. 482 and *Schelin* v. *Goldberg*, 188 P.A. Super. 341, 146 A.2d. 648.

The petitioners next attacked the utilization of Section 131 in connection with determining whether the act of selling intoxicated liquors to one already intoxicated constitutes an act which falls short of exercising due care and caution and in effect holding that such conduct may be inspected by a jury with respect to determining whether or not such a sale is or is not negligent under the qualities demanded by common law consideration. It is of no small significance that the legislature of Michigan as well as the legislature of Illinois found that the sale of liquor to one already intoxicated is an illegal act. Can it be said that the common law should impart a different quality of duty than those defined by the statutes by the

legislatures and should the common law be less demanding that such standards be maintained?

The petitioners seem to imply that the Court of Appeals did not have an opportunity in their final decision to consider the effect of the case of *Busser* v. *Noble*, 22 Ill. App. 2nd 443, 161 N.E. 2nd 150. An inspection of the pleadings in the United States Court of Appeals reveals that that Court's attention was called to the decision in the *Busser* case since the Busser Opinion was set forth in full in the Petition for Rehearing which Petition the Court denied. It ought be noted that the *Busser* case was not one determining either the interstate quality attendant in the present case nor was there in that case a milieu of "extraterritoriality" so that the plaintiff there would be denied any recovery. The Court in that case had no reason nor did it consider Section 131 from the standpoint of implying a duty. It only urged that the plaintiffs there had a recovery under the Illinois Dram Shop Act via Section 135, the consequence of which was that Section 131 was not available. The case of *Rogers* v. *Dwight*, 145 Fed. Supp. 537 upon which the *Busser* case relies stands on the same equation.

Next the defendants entertain the notion that the plaintiffs are not within the class of persons for whom Section 131 was designed and cite a bevy of cases none of which appear to have any real application. If the defendants were to cite any Illinois case concerning "classes" which a statute was supposed to protect, it ought have cited the case of *Ney* v. *Yellow Cab*, 2 Ill. 2d 74, 117 N.E. 2nd 74. In that case the Illinois Supreme Court examined the question of the violation of a "leaving a key in a car" statute as well as the elements of proximate cause as it is affected by a criminal act.

It found that the statute referred to, a part of the Uniform Traffic Act, was equally a public safety measure. Is not the enactment of Section 131 equally a public safety measure for in the sale of liquor to one who is intoxicated, there lurks the probability that, so deprived of his judgment, reason and reflexes necessary in the operation of an automobile, the intoxicated person will inflict injury upon members of the public. This decision further declared with respect to proximate causation and the flexibility of the common law at pages 81 through 84:

> "The common law has established itself in the history of jurisprudence because of its flexibility in its recognition of and adaptation to changing times and mores; and, as adopted by our legislature, 'is a system of elementary rules and of general declarations of principles, which are continually expanding with the progress of society adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country.' . . . Automobiles, once considered a luxury, are now considered by many to be a necessity. The man who once walked a mile now drives a block. The speed and power of automobiles have increased to the extent that safety experts are now showing keen awareness of their potentials even in the hands of rightful owners and careful operators. Incidents of serious havoc caused by runaway thieves or irresponsible juveniles in stolen or 'borrowed' motor vehicles frequently shock the readers of the daily press. With this background must come a recognition of the probable danger of resulting injury consequent to permitting a motor vehicle to become easily available to an unauthorized person through violation of the statute in question.
>
> • • •
>
> We are in agreement with the court below in our belief that reasonable men might differ on the question where there were special circumstances surrounding the defendant's violation of the statute which

may be the proximate cause of the damage that followed. We do not mean to be understood as holding that given a cause similar to the facts in the *Palsgraf* case we would hold otherwise than in the majority opinion; we do, however, believe that under the circumstances as presented in the case before us we find no persuasive authority and no impelling reasoning for this court to hold, as a matter of law, that no actionable negligence can exist."

The respondents suggest that these same compelling factors, even more dynamic and dangerous where an intoxicated person driving a car is involved, leads one to the unalterable conclusion that Section 131 sets a standard, a not unreasonable standard, the violation of which goes to the negligence of the petitioners in the sale of their liquor and these respondents may reasonably be presumed to be the beneficiaries of that standard of due care so pronounced.

The petitioners have proposed a line of argument as to the impact of the case on the liquor sales industry in that it greatly increases the risks and hazards of the business. As a corollary of such an approach choose to relate an argument which is de hors the record, namely, that they did not maintain insurance to cover the situation in question. The respondents have reason to believe that this representation is incorrect and that in fact the public liability policies of the petitioners afford them protection. However, in any event it occurs to the respondents that the existence or non-existence of insurance should not bear one whit upon a decision of this scope and character. It is respectfully submitted that the obtaining of an insurance policy is not the sole standard by which we protect our fellow men from our acts of negligence and that the standards and the responsibilities of our society can not be consigned to a conflict of indemnity. When the New

Jersey Supreme Court was faced with the proposition of "burden" in the case of *Rappaport v. Nichols*, 156 A.2d 1, it answered at Page 10:

> "We are fully mindful that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of the common law principles of negligence and proximate causation. But we are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by the unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants who can always discharge their civil responsibilities by the exercise of due care. It must be borne in mind that the plaintiff's complaint has no relation to service by persons not engaged in the liquor business or to lawful sales and service by liquor licensees, or to sales by reasonably prudent licensees who do not know or have reason to believe that the patron is a minor or is intoxicated when served; the allegations of the complaint are expressly confined to tavern keepers' sales and service which are unlawful and negligent. Liquor licensees who operate their business by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely the result we have reached in the conscientious exercise of our traditional judicial function substantially increases their diligence in honoring that obligation then the public interest will indeed be very well served."

CONCLUSION.

The respondents respectfully submit that the United States Court of Appeals arrived at a fair and just decision within the confines of those propositions announced in the case of *Erie Railroad Co.* v. *Tompkins* and those cases arising in its wake. The respondents respectfully submit that the Court of Appeals in applying the precepts of common law of the State of Michigan rendered honor to those conceptions, and in no way departed from them. The respondents respectfully submit that the decision of the Court of Appeals ought not be disturbed and that accordingly the petitioners be denied the relief which they seek in this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER, doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, et al.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER, doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION.

Petitioners feel compelled to make the following replies to certain contentions in respondents' brief in opposition to petition for certiorari.

I.

Reply to Respondents' Contention That The Decision Below Has Limited Application. (Resp. Br. p. 2)

Respondents seem to contend that this decision applies only to situations where liquor is furnished in one state and the injuries complained of occur in another state. Petitioners do not believe that the decision can possibly be construed to apply so narrowly. That is why we did not deem it necessary to add the interstate circumstances in the "question presented", as we explained in the footnote on page 2 of our brief.

To be sure, the decision was generated by the holding that there was no dram shop or civil damage recovery because of the interstate situation involved in the case, but the effect of the decision is not to confine its applicability to such situations only. There is no pronouncement in the decision itself that it shall be so limited, nor could any such limitation be logically sustained. If there is no common law right of recovery against furnishers of liquor, the fact that injury occurred in a state other than the one where the liquor was furnished cannot create such a right. If, on the other hand, there is such a right, it should be equally available to those who suffer injuries in the same state as where the liquor is furnished.

The reasoning of the respondents on this point appears to be that the decision applies only where action under existing dram shop or civil damage statutes is not available, due to interstate involvement, because of "the common law principle that for every wrong there ought to be a remedy". But this is fallacious reasoning. It assumes that the furnishing of liquor to an intoxicated person is a wrong, but, as we pointed out in our petition (pp.

9-10), it is not considered a wrong at common law. The fact that statutory remedies are not available in a given situation cannot create a common law tort out of conduct ordinarily considered not tortious.

Furthermore, it is not true that there is no remedy in such a sitaution. In the instant case, respondents certainly had a cause of action against the one responsible for the direct injury to them—the driver of the other automobile involved in the collision.

The decision of the court below cannot but be the occasion for releasing a flood of litigation, involving common law suits against liquor vendors, involving intra as well as interstate situations, and in states which do not have dram shop or civil damage statutes, as well as in states which do, in order to take advantage of the novel liability established by this decision. Already, as pointed out by respondents in their brief (pp. 12-14), since the issuance of the decision in the instant case, the Supreme Court of New Jersey, in the case of *Rappaport* v. *Nichols*, 156 A.2d 1, heavily relying on the decision in the instant case, allowed common law recovery against a tavern-keeper who sold liquor to a minor in favor of a person injured by the minor, and in a situation where both the furnishing of the liquor and the injuries occurred in the same state. From this flood of litigation, which is sure to follow if the decision below is allowed to stand, will come doubts, difficulties and great conflict between courts which desire to adhere to the established law in this field and those who desire to break with precedent.

II.

Reply to Respondents' Contention That The Decision Below Is Not of Novel Impression (Resp. Br. pp. 12-13)

Respondents seem to contend that the court below, in reaching its conclusion, simply applied standard established common law principles of tort liability, and that the decision therefore is not of novel impression. However, you cannot justifiably reach such a conclusion, by applying general principles of tort liability, when it is considered that the courts, by an unbroken line of decisions, have long ago rejected such argument with respect to liability of liquor vendors, and have firmly established that a vendor of intoxicating liquor is not, at common law, answerable to a third person for injury sustained by the latter as a result of the intoxication of the purchaser of the liquor. There is little doubt that the court below, in reaching its decision was allowing a right of action unknown to the common law. The decision below can only be considered as one which overrules all prior decisions and departs from the established doctrine that third persons have no common law right of action against vendors of intoxicating liquor.

The only cases which respondents cite as permitting recovery against tavernkeepers are *Pratt* v. *Daly*, 55 Ariz. 535, 104 P. 2d 147; *Swanson* v. *Ball*, 67 S.D. 161, 290 N.W. 482; *Schelin* v. *Goldberg*, 188 P.A. Super. 341, 146 A. 2d 648 (lv. to appeal denied by the Pa. Sup. Ct.); and *Rappaport* v. *Nichols*, 156 A. 2d 1.

Pratt v. *Daly*, *supra*, and *Swanson* v. *Ball*, *supra*, are inapplicable to the case at issue because they involve situations where the tavernkeepers have an established special duty toward the injured party (See p. 10 of our petition and footnote 11 on that page).

Rappaport v. *Nichols*, *supra*, first brought to light by respondents (Res. Br. pp. 13, 18), does not detract from the proposition that the instant case is of novel impression, because it simply follows in the footsteps of the instant case and adopts its new concepts of liability. It was decided after the decision in the instant case, relies heavily on it, and is encouraged by it to break with precedent. It is simply in the vanguard of decisions, contrary to established law, which are likely to follow in the wake of the decision in the instant case. The court in *Rappaport* v. *Nichols*, however, admits quite openly that, in permitting common law recovery against a tavernkeeper by a third party, it is stepping out of line and departing from established law. It says, on this point, at page 4 of its decision:

> "Judges elsewhere have dealt with the issue of whether tavernkeepers who unlawfully sell alcoholic beverages to persons who are already intoxicated or to minors who become intoxicated may properly be subjected to common law claims grounded on negligence where the intoxicated persons leave the taverns, carelessly drive their cars and injure others. Most of them, while acknowledging the justness of the common law principles which generally result in the imposition of liability for negligent conduct which cause injury to others, have rejected such claims. (citing many cases)"

It is to be noted, too, that all of the foregoing cases cited are in states which have no dram shop or civil damage statutes. Both *Rappaport* v. *Nichols*, *supra*, and *Schelin* v. *Goldberg*, *supra*, present situations where existing civil damage statutes had been repealed prior to the occurrence in question. Query whether the courts would have permitted common law recovery in these cases if there had still been in existence in the states in question civil damage statutes?

We pointed out in our petition (pp. 14-19), that in states having civil damage statutes, the courts have given a second and additional reason for not allowing civil damage actions against liquor vendors. This is the prevailing and uniform view that where there exists a civil damage statute, such statute has preempted the field, holding that no action for civil damages exists except that given by the statute, and that the remedy by statute cannot be enlarged except by further legislative enactment. Respondents seem to have entirely ignored this point in their brief. Suffice it to say, however, that no decision in any state which does not have dram shop or civil damage statutes can be cited as being contrary to the rule in dram shop or civil damage states that there exists no common law action, because it does not take into consideration the question of preemption by the statute.

III.

Reply to Respondents' Contention That The Decision Below Does Not Fail to Follow Applicable State Law in Violation of the Rule of Erie v. Tompkins. (Resp. Br. pp. 5-17)

It appears that respondents agree with petitioners that, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, federal courts, when deciding questions of conflict of laws in diversity of citizenship cases, must follow the rules prevailing in the state in which they sit.

Then respondents go on to say that in questions of conflict of laws, "Illinois will apply the place where the tort occurred". But what do respondents mean by "the place where the tort occurred"? Do they mean by it the place where the effects of allegedly tortious conduct have taken place, or the place where the conduct itself has been carried on? In the instant case, the alleged tortious

acts were the sales of liquor to intoxicated persons, and this all took place in Illinois—only the alleged effects of the sales, the injuries, took place in Michigan. The real question, in cases where the alleged wrongful act took place in one state and the injuries occurred in another state, is whether the Illinois conflict of law rule requires the application of the law of the state where the act took place or the law of the state where the injuries occurred.

The Illinois cases cited by respondents on page 6 of their brief; *i.e.*, *Mithen* v. *Jeffrey*, 259 Ill. 376, 102 N.E. 778; *Christiansen* v. *William Graver Tankworks*, 223 Ill. 142, 79 N.E. 97; *Opp* v. *Pryor*, 294 Ill. 538, 128 N.E. 580, do not decide this issue because they are all cases where the negligent act and the injury occurred in the same state, and are therefore not authority for respondents' contention that the law of Michigan should be applied in the instant case.

It is true that the courts of a great many states, in applying the rule that problems of the law of torts are to be decided under the law of the place where the alleged wrong took place, have come to identify the "place of wrong" as the place where the effects of allegedly tortious conduct took place, rather than the places where the conduct itself has been carried on. This place-of-harm rule, however, has been criticized frequently and severely. See, for example, articles by Professor Max Rheinstein, in 19 Tulane Law Review, pages 431 and 165-199, pointing out that this place-of-harm rule has been produced by historical accident, rather than through considerations of deliberate policy, and that its mechanical application results in unjust decisions which defeats the very policies for whose benefit the whole field of conflict of laws has been invented.

133 A.L.R. 263, which respondents cite on page 6 of their brief, contains annotations, alphabetically by juris-

dictions, of all cases which have followed this place-of-harm rule. There are no Illinois cases listed in this annotated report, however, because Illinois has never adhered to this unjust and fallacious rule.

The Illinois conflict of laws rule requires the application of the law of the state where the act, claimed as the basis of a tort, occurred, in determining whether there is a tort as a legal consequence, or whether the conduct was of a tortious character. Respondents complain that petitioners do not cite Illinois cases to support their position that this is the rule in Illinois. But we cite in support of this point decisions of several federal cases which set forth the Illinois conflict of law rule. (See petition p. 20). The *Addressograph-Multigraph Corporation* v. *American Expansion Belt & Manufacturing Co.* case, cited therein, was a suit for unfair competition, based on alleged misappropriation of plaintiff's system of marketing mechanical addressing machines by introduction into that system of the address plates of defendant, which had its principal place of business in Illinois where it received and filled orders for plates. Plaintiff did not want the law of Illinois to apply, contending that the wrongs to plaintiff by reason of defendant's false advertising and libelous statements were accomplished at the point that these charges were in legal contemplation published, that is, where the plaintiff's customers and the public read such charges, which was outside the State of Illinois, and which was where the damage was done. The Seventh Circuit Court of Appeals, in rejecting this argument, stated:

> "We do not agree with this contention. As pointed out heretofore, the main charge of unfair competition was a misappropriation by the defendant of plaintiff's business system. The essential element of this wrong was the manufacture and sale by the defendant of

plates for the purpose of use in certain machines manufactured and sold by the plaintiff. Defendant's place of business was in Illinois where it received and filled orders for such states. The wrong, if such it be, was the sale in Illinois for the use indicated. In our judgment there is no merit in plaintiff's argument that no wrong was committed until the plates were actually used in a foreign state . . ." 124 F. 2d 706, 709."

In a similar type of situation, the case of *Ferroline Corp.* v. *General Aniline & Film Corp.*, also cited on page 20 of our petition, the Seventh Circuit Court of Appeals said:

"Since our jurisdiction rests on diversity of citizenship, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the law of the forum, Illinois is determinative of the substantive issues, including the issue of conflict of laws. *Smith* v. *Dravo Corp.*, 7 Cir., 203 F. 2d 369. The action here sounds in tort, the liability for which the courts of Illinois determine by the place of the wrong. *Smith* v. *Dravo Corp.*, *supra*. This is New Jersey, for it was there that defendant appropriated the information received to its benefit, and, allegedly, wrongfully to plaintiff's detriment." 207 F. 2d 912, 920.

Respondents, whose same counsel were in this case from its inception, point out that the court below was aware of the decision of the case of *Busser* v. *Noble*, 22 Ill. App. 2d 443, 161 N.E. 2d 150, before rendering its final decision in the instant case. (Resp. Br. p. 15). This makes it even clearer that the court below, in deciding the instant case, departed not only from general Illinois principles as to common law tort liability of dram shop keepers, but as well from decisions of Illinois Courts on the precise question facing the court below in the instant case. Respondents contend that the *Busser* case has distinguishing features, but the differences are not such as

should affect the decision. The same statutes are involved, and the question presented is substantially the same in both cases. The Court, in the *Busser* case, did not hold, as respondents contend, that plaintiffs did not have a cause of action under Section 131 because they could recover under Section 135, but held, in effect, that because there is a civil damage statute in Illinois (sec. 135), it has preempted the field so that no other action for civil damages exists. Petitioners were correct in stating that the instant case and the *Busser* case reached diametrically opposite results.

Respondents take petitioners to task for their reasoning that the common law of Michigan on the question in issue is the same as the general common law rule applicable to the situation because the question has never been passed on by any Michigan Court of review. (Resp. Br. p. 14). However, *this is perfectly valid reasoning in view of the well settled rule of law in most jurisdictions that, in the absence of proof to the contrary, the common law is presumed to be in force in sister states which were originally under common law jurisdiction.* 15 C.J.S., Common Law, sec. 20; *Opp* v. *Pryor*, 294 Ill. 538, 128 N.E. 580; *Miller* v. *Miller*, 257 Ill. App. 287; *Grinestaff* v. *N.Y.C.R.R.*, 253 Ill. App. 583; *Barrow* v. *Phillips*, 250 Ill. App. 587. The Michigan authorities recognize that this is the situation in Michigan. 15 Michigan Law and Practice, title Liquor, sec. 61, p. 543, although citing no Michigan cases in support thereof, states as follows:

> "At common law, apart from statute, there was no remedy against the dispenser of liquor for injuries and damage resulting from the acts of intoxicated persons."

Thus, in applying Illinois law that there is a presumption that the common law of a sister state is the same as its own, the court below was bound to presume that Michi-

gan law on the question was the same as that of Illinois, unless there was specific proof to the contrary.

Respondents devote a great deal of space (Resp. Br. 8-12) and effort in an endeavor to demonstrate that the Michigan common law on the question in issue is contrary to the general prevailing view at common law that there is no cause of action against one who sells liquor to an intoxicated person in favor of the person injured by the intoxicated person, at least to the extent that it permits a cause of action in the instant case. This they do by laboriously gathering from various Michigan cases, many on subjects far removed from the one involved in the instant case, statements on various elements which go to make up a tort, and claiming that the sum total of them add up to give the plaintiffs a cause of action under the common law of Michigan. We submit that this is wasted effort and to no avail, in view of the well established common law rule on the specific subject covered in the instant case. Respondents cannot by using general principles of tort liability overcome a specific common law rule as to a specific situation.

The court below neither followed applicable Illinois law nor applicable Michigan law in violation of the rule of *Erie* v. *Tompkins*.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 22, 1960